In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. ---------.

MID-VALLEY PIPELINE COMPANY,

Appellant,

vs.

DONALD R. KING, COMMISSIONER OF REVENUE,

Appellee.

MID-VALLEY PIPELINE COMPANY,

Appellant,

vs.

THOMAS D. BENSON, COMMISSIONER OF REVENUE,

Appellee.

(Three cases)

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the basis upon which it contends that the United States Supreme Court has jurisdiction on direct appeal to review the final decision and judgment of the Supreme Court of Tennessee, entered August 23, 1968, affirming a judgment of the Chancery Court of Davidson County, Tennessee.

The Supreme Court of Tennessee held that as applied to appellant, which is engaged exclusively in interstate commerce—solely in the interstate pipeline transportation of crude oil from origin points south of Tennessee to des-

tinati[illegible]n points north of Tennessee, the imposition of franchise and excise taxes upon appellant did not violate the Commerce and Due Process Clauses of the United States Constitution. Appellant submits that the United States Supreme Court should exercise its jurisdiction in this case to correct the decision of the Supreme Court of Tennessee.

OPINIONS BELOW.

Three cases instituted by appellant were consolidated for trial in the courts below. In two, Donald R. King as Commissioner of Revenue of Tennessee, was named defendant and in the third case his successor, Thomas D. Benson as Commissioner of Revenue of Tennessee was the defendant.

The opinion of the Tennessee Supreme Court is officially reported at _____ Tenn. _____ and unofficially reported at 431 S.W. 2d 277. Copies of the opinion and of the judgment of that Court are attached hereto as Appendix A and Appendix B, respectively. Copies of the opinion of the Chancery Court of Davidson County, Tennessee, dated February 1, 1968 (not reported) and of the judgment entered by that Court on February 29, 1968, are attached hereto as Appendix C and Appendix D, respectively.

JURISDICTION.

(i) In May, 1965, the then Commissioner of Revenue of Tennessee demanded in writing that appellant file franchise and excise tax returns under Chapters 29 and 27, respectively, of Title 67, Tennesee Code Annotated, for the taxable year 1963 and 1964, asserting that appellant was liable for such taxes for such years, and annually thereafter. Appellant filed the demanded returns and paid the

franchise and excise taxes to the Commissioner of Revenue under protest asserting that the imposition of the same violated the Commerce and Due Process Clauses of the United States Constitution. In accordance with the applicable Tennessee statutes appellant filed suit in the Chancery Court of Davidson County, Tennessee for recovery of the taxes and interest.

(ii) In like manner appellant filed franchise and excise tax returns with the Commissioner of Revenue for the years 1965 and 1966 under similar protests and paid those taxes under similar protests and for each year filed a petition for the recovery of such taxes in the Chancery Court for Davidson County, Tennessee. The cases involving the aforesaid taxes for the years 1963 to 1966, inclusive, were consolidated for trial in said Chancery Court and likewise were consolidated on appeal in the Supreme Court of Tennessee.

(iii) The said Chancery Court in a memorandum opinion, dated February 1, 1968 (Appendix C hereto) held the imposition of the franchise and excise taxes to be lawful and by journal entries, dated February 29, 1968 (Appendix D hereto) dismissed appellant's petitions. The appeal to the Supreme Court of Tennessee was allowed to appellant in the aforesaid journal entries of the Chancery Court.

(iv) The Tennessee Supreme Court in an opinion dated August 23, 1968, affirmed the determination of the Chancery Court and judgment was entered accordingly (Appendix A and Appendix B hereto). Notice of appeal was filed by the appellant with the Tennessee Supreme Court on November 4, 1968.

(v) The jurisdiction of the United States Supreme Court to review the decision and judgment of the Ten-

nessee Supreme Court is conferred by 28 U.S.C., Sec. 1257, which reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(2) 'By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.' "

(vi) Cases which sustain the jurisdiction of this court to entertain an appeal under the quoted statute include the following:

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S. Ct. 396 (1954);

Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 74 S. Ct. 558 (1954);

National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 87 S. Ct. 1396 (1967);

The case at bar falls squarely within 28 U.S.C., Sec. 1257.

(viii) Appellant contends that Chapters 29 and 27 of Title 67, Tennessee Code Annotated imposing franchise and excise taxes, respectively, on foreign corporations are invalid and unconstitutional insofar as they have been construed by the Tennessee court to be applicable to appellant.

Appellant is engaged exclusively in interstate commerce. There is in this case an absence of any local activities of appellant in the State of Tennessee which may properly be regarded as sufficiently "separable from" its physical operation of an interstate crude oil pipeline. There is

no "nexus" to permit the imposition of a Tennessee "privilege" tax. No question as to the proper amounts of the franchise and excise taxes for the several years involved in this case, or the method of calculation thereof, are presented by this appeal.

The pertinent portions of Chapters 29 and 27 of Title 67, Tennessee Code Annotated are attached hereto as Appendix E.

(ix) The Tennessee Supreme Court in its opinion construed the franchise and excise tax statutes of Tennessee as not imposing a tax "on the privilege of doing an interstate business" as was the case with the Connecticut franchise tax law held unconstitutional by this Court in *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951); but did hold that the Tennessee taxes in question are "imposed upon the privilege of doing business in corporate form" in Tennessee and that they are additionally imposed "as a recompense for the protection" of the corporation's "local activities and as compensation for the benefits" the corporation "received from doing business in Tennessee."

(x) With respect to the aforesaid construction of the Tennessee franchise and excise tax statutes, appellant contends that all of its activities in Tennessee during the taxable years were inextricably bound up with interstate commerce, that the physical movement of crude oil by pipeline through Tennessee and the physical maintenance of such pipeline and related facilities were appellant's only activities in Tennessee. The movement of crude oil through Tennessee and the maintenance of interstate pipelines in fact constituted interstate operations and interstate commerce. Absent the pipeline and other facilities for the movement of crude oil or their maintenance, appellant

could not physically have moved crude oil through Tennessee at all. Appellant further contends that its existence in corporate form is not in itself sufficient under the Due Process Clause of the United States Constitution to sustain the imposition of taxes under either Chapter 29 or Chapter 27 of the Tennessee Code Annotated in the absence of local activities "separable" from its interstate operations.

QUESTIONS INVOLVED.

Given that appellant is an Ohio corporation, not domesticated or qualified in Tennessee, whose activities in that state are limited to physical operation and maintenance of a pipeline, pump stations and related facilities for the transportation of crude oil in a continuous movement in interstate commerce through the State of Tennessee, none of which activities cannot be realistically separated from the interstate transportation of crude oil:

A. Is the imposition by Tennessee of franchise and excise taxes upon appellant, under Chapters 29 and 27 of Title 67 of the Tennessee Code, constitutional insofar as applied to appellant under the Commerce Clause of the United States Constitution, Art. I, Sec. 8, I. 3?

B. Is the imposition of such franchise and excise taxes by Tennessee upon the Appellant constitutional insofar as applied to appellant under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF CASE.

The facts in this case are not in dispute. The essential facts are set out sufficiently in the opinions of the Tennessee Supreme Court and the Chancery Court of Davidson County, Tennessee (Appendix A and Appendix C hereto). Appellant is an Ohio corporation with its only operating office at Longview, Texas. It owns and operates a pipeline system for the transportation of crude oil from origin points south of Tennessee through the State of Tennessee to destination points north of Tennessee under the tariffs filed with the Interstate Commerce Commission in compliance with the requirements of the Interstate Commerce Act. The crude oil so transported is owned by shippers and consignees. Appellant receives no crude oil in Tennessee and delivers none in Tennessee. It has no office in that state, employs no salesmen or solicitors anywhere, receives no revenues from residents of Tennessee and engages in no promotional activities in Tennessee. Its activities were and are limited to the physical maintenance and operation of a single pipeline (including pump stations, a microwave communications system and related facilities) for the transportation of crude oil in a continuous movement through Tennessee.

The issues of the constitutionality, under the Commerce and Due Process Clauses, of the imposition of the Tennessee franchise and excise taxes upon appellant were raised by appellant in communications to the Tennessee Commissioner of Revenue (Stipulation of Facts and exhibits thereto) prior to the filing by appellant of any franchise and excise returns. These questions were subsequently raised in protest letters accompanying each of the returns and the tax payments, and in each of the petitions or complaints filed in the Chancery Court of David-

son County, Tennessee for the recovery of the taxes so paid by appellant. The same questions were presented and preserved upon appeal to the Tennessee Supreme Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

The federal questions raised on this appeal involve the proper interpretation of the Commerce and Due Process Clause of the United States Constitution and the validity thereunder of state "privilege taxes" on purely interstate transportation operations of a common carrier pipeline.

The Tennessee Supreme Court upheld the imposition of taxes imposed under Chapters 29 and 27 of the Tennessee Code Annotated upon appellant on the following two grounds:

(a) That the taxes were imposed on the "doing of business" in corporate form in Tennessee and were not discriminatory since they applied to all corporations; and

(b) The taxes were imposed as compensation for the protection of appellant's "local activities" which were deemed sufficiently separable from interstate commerce to justify that imposition.

Does the State of Tennessee by Virtue of Chapters 29 and 27 of the Tennessee Code Annotated Have the Constitutional Authority to Tax the Appellant, an Interstate Pipeline Carrier, Upon the Privilege of "Doing of Business" in Corporate Form in Tennessee?

Appellant contends that the State of Tennessee does not have the constitutional authority to impose a privilege tax on the doing of business in corporate form in Tennessee upon appellant. Appellant contends that the Tennessee taxes in their incidence upon the appellant are imposed simply upon the privilege of doing business.

This Court may discern for itself the practical effect, the operating impact, of a state tax and on the basis of its own determination, this court may formulate its opinion of the constitutionality of the tax. *Lawrence v. State Tax Comm.*, 286 U.S. 276, 280 (1932); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 177 (1939); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 433 (1940); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941); *Society for Savings v. Bowers*, 349 U.S. 143, 151 (1955); *Werner Machine Co. v. Director of Taxation*, 350 U.S. 492, 493 (1956); and *American Oil Co. v. Neill*, 380 U.S. 451, 455 (1965).

In *American Oil Company v. Neill, supra*, this Court, per Warren, C.J., stated at 380 U.S. 455:

> "When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. Wisconsin v. J. C. Penney Co., 311 U.S. 435, 443-444; Lawrence v. State Tax Comm'n., 286 U.S. 276, 280 and cases cited therein. This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 80."

The appellant admits that its pipeline does pass through the State of Tennessee; appellant admits that by owning a right of way and certain parcels of property in Tennessee, it has subjected itself to substantial ad valorem real estate taxes. But appellant says that since it is a foreign corporation engaged solely in interstate commerce, i.e. in transportation of crude oil from points south of Tennessee to points north of Tennessee, and has no separable intrastate activities, the State of Tennessee cannot, consistently with the Commerce Clause, impose a franchise or

excise tax upon its privilege of conducting such interstate activities. *Murdock v. Pennsylvania,* 319 U.S. 105, 113 (1943); *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 463-464 (1959).

Appellant's real estate and pipeline easement in Tennessee are used *exclusively* in interstate transportation of crude oil. The activities of appellant in Tennessee are *inseparable* from interstate transportation of crude oil.

Appellant, a foreign corporation, engaged solely in interstate commerce in Tennessee, is exercising a privilege which Tennessee cannot tax since it is a federal privilege protected by the Commerce Clause. Owning property in Tennessee as part of the exercise of such federal privilege must be equally exempt from a state franchise or excise tax.

Does Appellant Conduct Within Tennessee "Local Activities" Sufficiently Separable from Interstate Commerce to Justify the Imposition of the Taxes Under Chapters 29 and 27?

Appellant contends that all its activities within the State of Tennessee are directly related to, and indeed an integral and inseparable part of its interstate commerce activities. The pipeline in question is automatic and is controlled by a microwave transmission from Longview, Texas. Obviously, any pipeline sometimes needs a physical repair and there are two foremen living in the jurisdiction of Tennessee and two electronic specialists who attend to the microwave facilities. But the personnel living within the State of Tennessee are directly concerned with the maintenance and operation of the pipeline—interstate commerce. This is not a case in which any local separable business is conducted, such as the solicitation of

orders, the picking up of commodities or the delivery of commodities within the State of Tennessee.

Admittedly this Court has sustained various state "privilege taxes" on corporations engaged in interstate commerce where it was found that there were local activities within the taxing state sufficiently separable and distinct from the interstate commerce operations. It is submitted that in each of such cases the corporation, apart from the purely interstate features of its operations, had local activities of one or more of the following kinds which were related to or designed to increase interstate business and were not themselves an essential part of the actual interstate operations—(i) regular solicitation of business through salesmen located in or traveling in each state—(ii) maintenance of offices for billing, collection of revenues, accounting, administration and/or promotional activities, including sales assistance to wholesalers or dealers handling the corporation's products—(iii) local newspaper advertisements, distribution locally of sales catalogues or brochures, continuous local contracts with customers and in some cases maintenance of local stocks of merchandise.

This court earlier held that a state privilege tax on a crude oil pipeline company not receiving or delivering crude oil within the taxing state is unconstitutional. *Ozark Pipeline Co. v. Monier,* 266 U.S. 555, 45 S. Ct. 184 (1925). Similarly, this court held unconstitutional a Texas privilege tax imposed on the privilege of "taking gas from a well" where the only activities of the pipeline company were the receiving of gas at the well and the immediate transportation of the same in interstate commerce. *Michigan-Wisconsin Pipeline v. Calvert,* 347 U.S. 157, 74 S. Ct. 396 (1954).

In the instant case in the Supreme Court of Tennessee the appellee relied heavily upon the case of *Memphis Nat-*

ural Gas Co. v. Stone, 335 U.S. 80, 68 S. Ct. 1475 (1948). There are several outstanding reasons why the decision in that case does not sustain the constitutionality of the Tennessee franchise and excise taxes levied under Chapters 29 and 27 of the Tennessee Code Annotated in the instant case. Several decisions of this court, more recent than that in *Memphis Natural Gas Co. v. Stone, supra*, including *Spector Motor Service, Inc. v. O'Connor, supra*, indicate that the decision in *Memphis Natural Gas, Inc. v. Stone, supra*, was not intended to invalidate the constitutional principles underlying the prior decisions of this court in *Ozark Pipeline Co. v. Monier, supra* and *Interstate Natural Gas Company v. Federal Power Commission*, 331 U.S. 682 (1947) in both of which cases franchise taxes on interstate pipelines had been held unconstitutional.

The more recent decisions of this Court severely limit the acceptability of *Memphis Natural Gas Co. v. Stone, supra*, and reassert the constitutional principle adhered to by the Supreme Court prior to that decision. These include, among others, the following—all of which were decided subsequent to *Memphis Natural Gas Co. v. Stone, supra*:

Spector Motor Service v. O'Connor, supra;
Michigan-Wisconsin Pipeline Co. v. Calvert, supra;
Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 72 S. Ct. 424 (1954);
Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 74 S. Ct. 558 (1954);
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S. Ct. 357 (1959);
American Oil Co. v. Neill, 380 U.S. 451, 85 S. Ct. 1130 (1965).

Spector Motor Service v. O'Connor, supra, is a landmark in the field of state taxation of interstate commerce.

Spector Motor Service contested the right of the State of Connecticut to levy upon it an excise tax under the provisions of a taxing statute which provided that corporations carrying on business in that State "shall pay, annually, a tax or excise upon its franchise for the state." The case reached the United States Supreme Court after the Supreme Court of Connecticut had construed the tax as follows:

> "The tax is then a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign * * *."

Spector Motor was engaged in the interstate transportation of freight by motor trucks, which went directly to the customers' places of business in the case of full truck loads, and which used pickup trucks to gather less than truck load lots of freight from customers for assembly into full truck loads at either of two terminals maintained in the state.

The Supreme Court in this decision ruled that Spector Motor's operations constituted interstate commerce exclusively, and that the attempted application of the Connecticut excise tax was invalid as an attempt to tax the Federal privilege of carrying on exclusively interstate commerce.

Justice Burton, speaking for the majority, stated in part:

> "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce when they gave Congress the power 'to regulate commerce with foreign nations, and among the several states * * *.' U. S. Const., Art. I,

Section 8, cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress. Another example of this basic separation of powers is the inability of the states to tax the agencies through which the United States exercises its sovereign powers. See McCulloch v. Maryland, 4 Wheat. 136, 4250437, 4 L. Ed. 579; Brown v. Maryland, 12 Wheat. 419, 445-449, 6 L. Ed. 678; Mayo v. United States, 319 U.S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504.

* * * * *

"This Court heretofore has struck down under the Commerce Clause state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. Alpha Portland Cement Co. v. Com. of Massachusetts, 268 U.S. 203, 45 S. Ct. 477, 69 L. Ed. 916 (measured by percentages of 'corporate excess' and net income); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (Measured by percentage of capital stock and surplus). See Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 669, et seq., 69 S. Ct. 1264, 1267, 93 L. Ed. 1613 (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S. Ct. 815, 91 L. Ed. 993; Freeman v. Hewit, supra.

* * * * *

"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law —McCulloch v. Maryland, supra."

Footnote 6 to the majority opinion is of particular interest in the present case because of its reference to an earlier case very similar in its principles instituted by Texas Gas' Predecessor, Memphis Natural Gas Company. This footnote being as follows:

> "6. The decision in Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090, upheld a Tennessee tax on earnings of the taxpayer within that State where the earnings were derived from the intrastate distribution of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

The *Spector* minority opinion by Justice Clark, joined by Justices Black and Douglas, emphasizes the effect of the majority opinion in restoring to interstate commerce the immunity which it had previously enjoyed in earlier cases but which had been whittled away to a large extent in cases such as *Memphis Natural Gas Company v. Beeler,* 315 U.S. 649, 62 S. Ct. 857 (1942). This minority opinion states in part:

> "Neither such a standard nor such a result persuades me. I agree with the well-reasoned opinions of the court below that the cases upholding fairly apportioned taxes on mixed intrastate and interstate business, and recognizing the rights of states to make interstate commerce pay its way have enfeebled—and justifiably so—*the precedents which today's decision restores to full vigor.* In the not too distant past, this seemed to be quite clear. In Memphis Natural Gas Co. v. Beeler, 1942, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090, a tax was upheld as being reasonably attributable to intrastate activities. But Chief Justice Stone, speaking for a unanimous Court, went further to state:

"'In any case, even if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there * * * or upon net income derived from within the state * * * is not prohibited by the commerce clause * * *.' 315 U.S. at page 656, 62 S. Ct. at page 862." (Emphasis added.)

As heretofore seen, it is undisputed that Mid-Valley is engaged in Tennessee solely and exclusively in interstate business. The *Spector Motor* case is supreme authority for the proposition that the State of Tennessee cannot exact from Mid-Valley a tax for the privilege of conducting such business under whatever guise said tax may be clothed.

The decision in *Michigan-Wisconsin Pipeline Co. v. Calvert, et al.*, 347 U.S. 157, 74 S. Ct. 396 (1954), resulted from separate suits to recover amounts paid under a Texas statute imposing a tax on the occupation of gathering gas. The Supreme Court refused to follow the State's argument that gathering of gas prior to its transportation across the state line into Oklahoma was a local event which was taxable and reversed the Supreme Court of Texas which had upheld the validity of the tax, stating:

"The appellees place much emphasis upon the fact that Texas through these conversation and proration measures has afforded great benefits and protection to pipeline companies. It is beyond question that the enforcement of these laws has been not only in the public interest but to the commercial advantage of the industry. But, though this be an appealing truth, these benefits are relevant here only to show that essential requirements of due process have been met sufficiently to justify the imposition of any tax on the interstate activity * * *."

* * * * *

"* * * The State Appellate Court realistically found 'the taxable event described by the statute' to be 'the taking or retaining of the gas at the gasoline plant outlet * * *.' It thought that since this local activity was not subject to repetition elsewhere, 'the sole question is whether such local activities are so closely related to and such an integral part of the interstate business of (appellants) who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution * * *.'"

* * * * *

"* * * It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separate from it. Memphis Natural Gas Co. v. Stone, 1948, 335 U.S. 80, 87, 68 S. Ct. 1475, 1478, 92 L. Ed. 1832; Western Live Stock v. Bureau of Revenue, supra, 303 U.S. at page 258, 58 S. Ct. at page 550 * * *.

* * * * *

"* * * It is difficult to conceive of a factual situation where the incidence of taking or loading for transmission is more closely related to the transmission itself. This Court has held that much less integrated activity is 'so closely related to interstate transportation as to be practically a part of it!' We are therefore of the opinion that the taking of the gas here is essentially a part of interstate commerce itself."

The case of *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389, 72 S. Ct. 424 (1952), is particularly interesting inasmuch as it is a Mississippi case decided by the United States Supreme Court subsequent to the case of *Memphis Natural Gas Company v. Stone,* 335 U.S. 80, 68 S. Ct. 1475 (1948). It repudiated the theory of taxing

local incidents connected with interstate commerce upon which foundation the Stone case rested. In this case the Laundry Company contested the validity of a tax in the amount of $50.00 imposed "upon each person soliciting business for a laundry not licensed in this State as such." The Mississippi Supreme Court held that the tax was not a tax on interstate commerce but a tax on a person soliciting business for his laundry not licensed in the State, a local activity which applied to residents and non-residents alike. Chief Justice Vinson, delivering the majority opinion, stated:

> "It would appear from portions of the opinion of the court below that the tax is laid upon the privilege of soliciting interstate business on the theory that solicitation of customers for interstate commerce is a local activity subject to state taxation. However, the opinion below may also be read as construing the statutory term 'soliciting' more broadly, thereby resting the tax upon appellant's activities apart from soliciting new customers in Mississippi, namely the pick up and delivery of laundry and cleaning on regular routes within the State. Each construction of the statute raises different considerations. But clarification of the operating incidence of the tax is not required for disposition of this case since we find that the tax violates the Commerce Clause under either reading of the statute.
>
> I.
>
> "In the long line of 'drummer' cases, beginning with Robbins v. Shelby County Taxing District, 1887, 120 U.S. 489, 7 S. Ct. 592, 30 L. Ed. 694, this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted

state taxation to carve out this incident from the integral economic process of interstate commerce. As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'Interstate commerce itself knocks on the local door.'

"If the Mississippi tax is imposed upon the privilege of soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business. A tax so imposed cannot stand under the Commerce Clause. Spector Motor Service, Inc. v. O'Connor, 1951, 340 U.S. 602, 608-609, 71 S. Ct. 508, 511-512, 95 L. Ed. 573, and cases cited therein."

The Court then refused to allow the tax to stand under the theory of the "peddler cases" as a tax upon itinerant hawkers and peddlers, the theory there being that the local sale and delivery of goods is essentially an intrastate process. It ruled that even under this approach there was discrimination inasmuch as the tax applied only to persons soliciting business for a laundry not licensed in the State and did not apply in the case where a laundry was located in the State. In conclusion the Court stated:

"To sum up, we hold that the tax before us infringes the Commerce Clause under either interpretation of the operating incidence of the tax. The Commerce Clause created the nationwide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause.

'Reversed.' "

Only Justice Black dissented from the opinion. The Court made no mention of *Memphis Natural Gas Com-*

pany v. Stone, supra, but specifically rejected the doctrine that local activities may be separated from interstate commerce and become the foundation of a privilege tax.

In the case of *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359, 74 S. Ct. 558 (1954), a Virginia statute levied taxes on properties of express companies but additionally provided that "for the privilege of doing business in this state" express companies shall pay an "annual license tax" upon gross receipts earned in the state "on business passing through, into or out of this state." The plaintiff engaged exclusively in interstate transportation of freight. It picked up shipments in the state. It did not engage in the transportation of commodities from one point to another within the state.

The Supreme Court held that the additional so-called "license tax" was not, in fact, a property tax but a privilege tax sought to be imposed in respect of local activities inseparable from interstate commerce and consequently was unconstitutional as a tax on interstate commerce.

Mr. Justice Jackson, in his opinion (page 367) uses the following language which in all respect supports the position of the appellant herein:

> "Here the State exercises every receipt from movement of express interstate commerce. It takes a portion of gross revenue from 'all receipts earned in this State on business passing through, into or out of this State.' It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern

> doing a nationwide business is vulnerable to a gross-revenue tax in every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602; Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157; New Jersey Bell Telephone Co. v. State Board, 280 U.S. 338."

Appellant submits that in the light of recent decisions of this Court, the Supreme Court of Tennessee was clearly wrong in sustaining the validity of the taxes imposed by Chapters 29 and 27 of the Tennessee Code Annotated. The taxes as imposed upon appellant severely burdened interstate commerce. The activities of appellant, in turn, are solely and exclusively related to interstate commerce and are not local in character. All of appellant's activities are inseparable from and an integral parts of its interstate pipeline activity.

CONCLUSION.

In recent years a number of state supreme courts have had occasion to pass on the constitutionality, under the Commerce Clause, of privilege taxes imposed by their own states. In many such decisions the state supreme courts either by direct decision or by way of dicta have held or observed that the imposition of any such privilege taxes on an interstate pipeline company if construed to apply to the complaining corporation would violate the

Commerce Clause of the United States Constitution. Such decisions, or at least dicta contained therein, exemplified by the following cases, are clearly contrary to the determination of the Tennessee Supreme Court in this case. *State v. Plantation Pipeline Company,* 265 Ala. 69 (1956), 89 So. (2nd) 549 (1956), cert. den. 352 U.S. 943, 77 S. Ct. 265 (1956); *Sinclair Pipeline Company v. Carpentier,* 10 Ill. (2nd) 300, 140 N.E. (2nd) 115 (1957); *American Telephone and Telegraph Company v. Everett,* 152 A. (2nd) 295 (Del. Ch. 1959).

The Tennessee Supreme Court's decision in the instant case is clearly in conflict with the decisions of other state supreme courts cited immediately above. There appears, therefore, to be confusion as to the type of state "privilege taxes" which might be held to be constitutional under the Commerce Clause when applied to pipeline companies engaged exclusively in interstate transportation.

It is therefore submitted that this Court should exercise its jurisdiction to review the decision of the Tennessee Supreme Court herein to the end that such confusion be dispelled.

Respectfully submitted,

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